United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 22,178
George A. Neal, Jr.

Appellant

v.

United States of America,

Appellee

589

No. 22,298
Michael L. Robinson,

Appellant

v.

United States of America,

Appellee

Appeals from the United States District Court
for the District of Columbia

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution Amendment IV -

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U. S. Constitution Amendment V -

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. Constitution Amendment VI -

> "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

D. C. Code 22-502. Assault with intent to commit mayhem or with dangerous weapon.

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, §804.)"

D. C. Code 22-2901. Robbery.

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, §810.)"

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. When did the arrest of appellants occur, and was there probable cause for such arrest?

II. Whether the Trial Court comitted reversible error by failing to grant appellants' motion to suppress evidence of their identification by the complainant.

III. Whether the appellants' rights under the Sixth Amendment were violated by the government's introduction into evidence the pre-trial identification of appellants.

IV. Whether evidence of the pre-trial identification of appellants should have been suppressed upon the grounds that such identification was made under circumstances so highly suggestive and prejudicial as to deprive appellants of due process of law.

(This case has not previously been before this Court)

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

Defendants Michael Robinson and George Neal were arrested on November 22, 1967, and indicted on January 8, 1968, for the crimes of robbery and assault with a dangerous weapon. (22 D.C. Code 2901, 502), to which charges defendants pleaded not guilty in Criminal Action No. 35-68. A motion to suppress identification testimony was heard and denied on May 21, 1968, trial on the charges was held on May 21 and 22, 1968, and defendants were found guilty on both counts. On June 14, 1968, defendant Neal was sentenced and on July 5, defendant Robinson was sentenced, both defendants sentenced to not less than two years nor more than eight years on count one; and not less than one year nor more than three years on count two, the sentences to run concurrently. Thereafter, timely notice of appeal was filed by both defendants. Jurisdiction over this appeal is granted by 28 U.S.C.1291. The docketing in this Court of the record on appeal was completed on September 23, 1968.

B. STATEMENT OF FACTS

Appellants, George A. Neal, Jr. and Michael L. Robinson, were charged in a two count indictment with robbery (22 D.C. Code 2901) and assault with a dangerous weapon (22 D.C. Code 502), arising out of an incident occurring on November 22, 1967,

in the 1700 block of New Hampshire Avenue, N.W., Washington, D. C. The Government called five witnesses: Joseph M. Tate, the complainant, Albert Hinton, the complainant's brother, police officers E. J. Davis, R. F. Thomas, R. J. Murray, and N. A. Inguanti. Appellants Neal and Robinson testified in their own defense.

The complainant Tate testified that he was driving a vehicle, in which his brother, Albert Hinton, was a passenger, in a southerly direction on New Hampshire Avenue, at approximately 10 P.M. on the above date. (Tr. 82, 102). Both Tate and Hinton testified that when the car approached a stop sign and stopped for traffic, a group of individuals stopped the car, opened the doors and attacked them. (Tr. 34, 84, 146-148). Hinton ran from his assailants and returned to the scene only after the police had arrived. (Tr. 149). Tate testified that he was attacked by a group of seven to ten individuals (Tr. 105) and he ran into an alley where he was beaten, stabbed and robbed. (Tr. 87, 91). Tate stated that after the attack, his assailants fled the alley and ran south on New Hampshire Avenue toward Dupont Circle (Tr. 93), whereupon he returned to his car on New Hampshire Avenue. (Tr. 94). Approximately ten minutes thereafter officer Davis arrived on the scene (Tr. 24, 111) in response to a radio call directed to another police car.

Officer Davis observed Tate standing in the middle of the street holding his side and immediately requested an ambulance. (Tr. 25, 158).

Officer Thomas, who coincidentally was in that neighborhood, stated he noticed a commotion and stopped at the scene. (Tr. 6-7, 184). Officer Davis told officer Thomas that Tate had been robbed and assaulted (Tr. 183) and officer Thomas proceeded to talk with Tate who stated that his assailants had run south on New Hampshire and west on Riggs Place. (Tr. 183). Tate further gave a vague description of his assailants to officer Thomas, describing them as negro males in their late teens. (Tr. 8, 129-131). Immediately officer Thomas made a U-turn, proceeded south on New Hampshire Avenue and turned right into Riggs Place. Upon observing three negro males walking west at a normal pace on the south side of Riggs Place toward the scene of the crime, he stopped his car and accosted them. (Tr. 10-13, 189). When officer Thomas stopped the three pedestrians, he asked them where they had been and where they were going. (Tr. 11-12). They responded that they were returning from a dance. (Tr. 11-12). Officer Thomas, Neal and Robinson all testified that officer Thomas then told them that a man had been robbed up the street, asked them if they knew anything about the incident, and invited them to return to the

scene with him. (Tr. 12, 184, 47, 227, 53, 252-253). The response to officer Thomas' "invitation" was that they did mind and under the circumstances they got into the police car. (Tr. 13, 134, 48, 227, 53, 252), although Robinson testified that he did not feel that he was free to refuse the "invitation" and continue walking down the street. (Tr. 54). After placing the three individuals in the back seat of the police car, officer Thomas returned with them to the scene of the incident. (Tr. 14, 185, 228, 253). Upon arriving at the scene, officer Thomas turned on the dome light of the police car, and called Tate to the car. He asked Mr. Tate, "Can you identify these boys" and Mr. Tate promptly did identify them. (Tr. 14, 185, 253). At this time Tate was bleeding and suffering pain from abrasions to both knees, abrasions to the left forearm, laceration of the right thumb, multiple lacerations to one side of his face, and a stab wound to the abdomen. (Tr. 17-19, 216-217).

Officer Murray testified that in response to a "radio run" he arrived at the scene and was told by a lady that juveniles had run out of an alley. Upon investigating the alley he found a wallet and returned it to officer Davis who stated that it belonged to Tate. (Tr. 196-198).

In response to a call, officer Inguanti arrived with a patrol wagon whereupon the three individuals were searched and placed therein. (Tr. 160, 231).

Hinton, in looking for his hat, found a hat that did not belong to him in Tate's car and he gave the hat to a police officer who subsequently handed the hat to someone in the patrol wagon. (Tr. 150, 206). Robinson testified that he took the hat from the officer thinking that it resembled his hat. (Tr. 254-255).

Hinton testified that he saw Neal throw down some papers in the patrol wagon which officer Inguanti picked up and turned over to officer Davis. The papers were identified by Hinton as registration cards (Tr. 154). Officer Inguanti, however, testified that someone in the wagon threw down the papers but he was totally unsure as to who it was. (Tr. 207). Robinson testified that at no time did he recall any incident involving papers in the back of the wagon (Tr. 255) and Neal flatly denied that he had ever made any statement about the papers or that he had even seen the papers. (Tr. 242).

After deliberation the jury found both Neal and Robinson guilty on both counts.

SUMMARY OF ARGUMENT

I. Appellants contend that when they were stopped by a uniformed police officer in a marked police vehicle, were asked questions to which they gave perfectly satisfactory answers, and then were "invited" to enter the police car and accompany the officer, under the circumstances of this case they were at that time as a matter of law under arrest, since their liberty of movement was clearly restricted, there was an actual and under the circumstances unreasonable restraint of their persons, and under the circumstances they had not consented to such seizure of their persons. Appellants further contend that since the arresting officer at the time had only a vague description consisting of negro males in their late teens, and since their appearance, actions or statements could not have aroused the suspicions of a reasonable man that they had committed any felony (they were walking at a normal pace toward the scene of the crime, they were not out of breath, nor were their clothes disarranged and they answered all of the policeman's questions in an entirely satisfactory manner), there was as a matter of law no probable cause for their arrest. Appellants contend, in short, that their arrest was illegal.

II. Appellants further content that their on-scene identification was the proximate result of their illegal arrest and that the admission over objection at trial of testimony concerning such identification constituted reversible error.

III. Appellants contend that when they were returned to the scene of the crime under compulsion and were confronted with the complainant prior to trial but after an illegal arrest, without the presence of counsel, for the express purpose of identification, their Sixth Amendment rights were violated and such identification evidence was inadmissible at the trial under the doctrine of Wade and Gilbert.

IV. The fact that the appelants were as the result of an illegal arrest forceably confronted with complainant under circumstances which were highly prejudicial and suggestive renders such identification evidence inadmissible at the trial inasmuch as under the circumstances of this case, the admission of such evidence deprives them of due process.

ARGUMENT

(Pages 6-14, 54, 66-69, 129-131, 183, 191 of the transcript should be read in connection with the following argument).

I. When did the arrest of appelants occur, and was there probable cause for such arrest?

Appellants contend that they were under arrest at the time they were first placed in the patrol car of officer Thomas, and that since there was no probable cause for the arrest, their arrest was illegal and certain identification testimony was inadmissible as evidence before the trial court. A timely motion to suppress such evidence was made before that court. (Tr. 5 et seq.).

The evidence germane to this contention is as follows: At approximately 10:00 P.M. on the evening of November 22, 1967, officer Thomas was driving his patrol car in the vicinity of 1735 New Hampshire Avenue, N.W., when he stopped to investigate a disturbance upon observing a car parked in the street, "a lot of commotion" (Tr. 7) and police officer Davis standing with the complainant, Mr. Tate, and others in the street. (Tr. 6-8, 183). After talking briefly with officer Davis and Mr. Tate, officer Thomas learned the following: (1) that Mr. Tate had been robbed and assaulted, (2) that the criminals had run down New Hampshire Avenue, N.W. and turned west into the 1700 block of Riggs Place, N.W. (Tr. 7-8, 183), (3) that Mr. Tate described

the criminals as a group of teen-age Negro males (Tr. 129-131, Tr. 191). Thereupon, officer Thomas made a U-turn, drove south on New Hampshire Avenue, N. W., turned west into Riggs Place, N. W. and as he did so he observed three Negro males walking east on Riggs Place, N. W., toward the scene of the robbery and assault (Tr. 10). Officer Thomas got out of his scout car, stopped the three pedestrians, two of whom were the defendants Neal and Robinson, and after questioning them briefly, told them that "a man had been robbed up the street here... and I asked if they would mind going back to the scene, and one of them said We don't mind, or we haven't done anything." (Tr. 12). One appellant testified that he did not at that point think he was free to continue walking down the street (Tr. 54). Officer Thomas was in full uniform at the time and was driving a marked police car. Upon the policeman's "request," the three men got into the police car and were returned to the scene, whereupon, all three were identified under very prejudicial circumstances by Mr. Tate as the persons who assaulted and robbed him. (Tr. 14).

The trial court held that the arrest of appellants did not occur until after they were returned to the scene of the robbery and were identified by the complainant. (Tr. 68). The trial court further held that had the arrest occurred at

the time the defendants were placed in the police car, there was no probable cause for such arrent and clearly the arrest would have been illegal. (Tr. 131).

The trial court based its holding that no arrest occurred prior to the defendants being identified at the scene of the robbery upon the facts "That they got into the police car voluntarily -- that they were not searched, nor were they patted down, and that the failure to pat down a suspect under arrest prior to putting him in a police car behind you, particularly, would be a violation not only of good sense and good judgment, but of police regulations." (Tr. 67-68).

This court in Kelley v. United States, 111 U.S. App. D.C. 396, 298 F2d 310 (1961), has specifically approved an instruction to the jury defining arrest as follows:

> "You are instructed that in order for there to be an arrest it is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence. (Italics in the original)."

It is undeniably true that the appellants did not resist the police officer nor did they refuse to enter the police car. In that very limited sense their custody by the policeman was

voluntary. But to conclude that they were acting under no compulsion as free agents is not compatible with the facts. The record simply does not support the holding that they were not under arrest then.

The United States Supreme Court has specifically held that one need not protest his arrest:

> "The Government also makes, and several times repeats, an argument to the effect that the officers could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station. One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases. But courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A layman may not find it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon. It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. If the officers believed they had probable cause for his arrest on a felony charge, it is not to be supposed that they would have been dissuaded by his profession of innocence.
>
> "It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case. An inference of probable cause from a failure to engage in discussion of the merits of the charge with arresting officers is unwarranted. Probable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman. It is the officer's responsibility to

> to know what he is arresting for, and why, and one of the unhappy plights of being taken into custody is not required to test the legality of the arrest before the officer who is making it."
>
> United States v. Di Re, 332 U.S. 581 68 S. Ct. 222 (1948)

In the Di Re case the court was concerned with whether there had been probable cause for an arrest, there being no question that an arrest had occurred. In the present case there is no question that there was no probable cause for an arrest when the appellants were taken into police custody (Tr. 131), the only question being when the arrest occurred. But the reasoning of the Court in Di Re is certainly applicable here since the trial court has based its holding that an arrest did not occur on Riggs Place, N. E. in part on the fact that appellants voluntarily got into the police car. (Tr. 68).

In this case a police officer stopped three teen-age boys (the oldest was nineteen) on the street. According to the police officer's own testimony, he asked them where they had been and they told him. He told them that a man had been robbed in the vicinity and asked them if they would go with him to the scene, to which one of them replied "We don't mind, or we haven't done anything." (Tr. 12). He requested that they get into the police car and they did. Taking into consideration that the policeman was in full uniform, was driving a police car, that appellants were young boys, it is difficult to

comprehend what alternative to their action was open. They would have been rash indeed to do anything except get into the scout car. And the uncontradicted testimony of appellant Robinson clearly indicates this:

> "Q. When the officer spoke to you, Mr. Robinson, did you think you were free to continue walking down the street at that time?
>
> A. No, I didn't." (Tr. 54).

Appellants do not deny that officer Thomas had the right to stop them on the street and question them as to where they had been. But when the officer received satisfactory answers and had no probable cause to detain them, appellants strongly urge that when they were "invited" into the police car, their liberty of movement was certainly restricted, there was an actual and, under the circumstances, an unreasonable restraint of their persons that as a matter of law constituted an arrest.

In Higgins v. United States, 93 U.S. App. D.C. 340 (1954) 209F2d 819, the government admitted that there was no probable cause for a serach of appellant's apartment which disclosed marijuana, but at a hearing on the motion to suppress the government contended that appellant consented to the search, the searching policemen having testified that appellant invited them into his room and stated that they were perfectly welcome to look anywhere in the room they wanted to. The Court granted

the motion to suppress, holding that in spite of appellant's words and actions, it would be unreasonable to conclude that true consent, free of fear or pressure, had been given, and quoted the Supreme Court on this point:

> "Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." (emphasis added).
>
> Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367 (1948)

In Higgins, the defendant was the inviting party, but the court found no consent in spite of this. In the present case it was not the appellants but a uniformed police officer who did the inviting under circumstances that clearly showed the "invitation" was an order. Appellants are asking less here than this very court has already granted in Higgins.

In the present case, it is inconceivable that appellants Neal and Robinson got into the police car and accompanied the officer except in submission to authority. Particularly at this time and in this city, where it would be appropriate for the court to take judicial notice of the many unfortunate confrontations between police officers and citizens, the law should not require a defendant to become hostile to authority in order to preserve his constitutional rights.

Both the United States District Court for the District of Columbia and this Court, in addition to Kelly v. United States, supra., have had occasion to consider in some detail the question of when an arrest occurs. See United States v. Scott, (D.C. Cir. 1957), 149 F. Supp. 837, United States v. Mitchell, (D.C. Cir. 1959), 179 F. Supp. 636, Seals v. United States, 117 U.S. App. D.C. 79, 325 F2d 1006 (1963) cert. denied 376 U.S. 964 (1964).

In United States v. Scott, supra, the question of whether certain evidence seized in defendant's apartment was admissable depended upon when defendant was arrested. Defendant had become a prime suspect to police investigating a robbery of a restaurant, and upon learning from a reliable informant that the defendant was planning to leave for Florida possibly within the hour, two policemen rushed to defendant's apartment, where they found the door ajar, but defendant absent. Upon entering the apartment they found liquor bottles and rolls of coins which had been stolen from the restaurant. One officer remained in the apartment while the other stationed himself at the second-story window. The defendant approached the building, saw a policeman and began to walk away. An officer followed defendant down the street, stopped him, established his identity and brought him back to the apartment,

where he was questioned and the bottles and rolls of coins in the apartment were seized as well as a sum of money from his person. He was then taken to the police station. The District Court was faced with the issue of whether the police seizure of the bottles and rolls of coins was valid, even though made without a search warrant, because the seizure was incidental to a lawful arrest. In order for the seizure of the evidence in the apartment to be incidental to a lawful arrest, the government was required to demonstrate that the arrest occurred when the defendant was questioned in his apartment and not prior to that time on the street. Thus in that case, as well as in the present case, the question of when an arrest occurred becomes crucial. The Court in Scott did not hesitate to hold that the arrest occurred on the street:

> "Aside from the question of whether 'probable cause' to make an arrest did or did not exist at the time the defendant was returned to his apartment by the police officers, there can be no question but that the defendant was, in fact, arrested on the street. The Government argues that the officer 'took custody of the defendant on the sidewalk * * * maintained custody of the defendant and immediately took him to the defendant's apartment.' The Government says, however, 'Displacement of defendant's person to the apartment' does not indicate that he was arrested prior to his arrival at the apartment. The Government's novel theory of 'displacement' is based upon a fundamental misconception of the meaning of the word 'arrest'. As our Court of Appeals stated in Long v. Ansell, 63 App. D.C. 68, at page 71, 69 F2d 386, at page 389, 94 A.L.R. 1466,

> 'From these authorities it may be concluded,' we think, that the term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued even for a short period of time.' Citing this case in Price v. United States, 119 A.2d 716, 719, the Municipal Court of Appeals for the District of Columbia said, 'The word 'arrest' has a well-defined meaning, the essence of which is a restriction of the right of locomotion or a restraint of the person * * * No doubt that appellants had liberty to take leave of the officer's presence * * * 'In this case the Government admits that the officer not only 'took custody' but 'maintained custody.' Accordingly, this Court must find that an 'arrest' was made on the sidewalk and not merely a 'displacement'."
>
> United States v. Scott, supra, at p. 840.

Two years later in 1959 the District Court again squarely faced the same issue in United States v. Mitchell, supra, and specifically reaffirmed United States v. Scott, supra, based on a factual situation which should be compared to the present one. A uniformed police officer walking his beat at 5:30 A.M. saw the defendant carrying something in a sack from which an electric cord was dragging. The officer stopped the defendant, asked him to identify himself, which he did, and asked him where he was coming from, to which defendant replied that he was coming from a party. No crime had been reported to the officer and he had observed none, nor was there any warrant for the arrest of the defendant outstanding, but the officer had

been walking his beat all night and had not observed an indication of a party in the neighborhood. The officer asked the defendant to accompany him to a call box one block away, and upon defendant inquiring whether he was under arrest the officer replied, "No, you are just being detained." At the call box, defendant seated himself on the package he had been carrying while the officer asked if any housebreakings had been reported. He was told there had not and then requested a scout car be sent. At that moment a scout car coincidentally appeared and defendant fled. Upon being apprehended one week later he was indicted for housebreaking and larceny, and he moved to suppress as evidence the package he had been carrying. The Government conceded that there was clearly no probable cause for an arrest until sometime after the defendant fled, but contended that no arrest took place. The Court held otherwise:

> "The Court has thoroughly examined the issue of what constitutes an 'arrest' in its opinion in United States v. Scott, (D.C. D.C. 1957) 149 F. Supp. 837. For the reasons and authorities discussed therein, the Court is of the opinion that the defendant was arrested when he accompanied the officer to the call box."
> United States v. Mitchell, supra.

In Mitchell the officer stopped and questioned the defendant, receiving an apparently unsatisfactory answer to one question. In the present case the officer stopped and questioned.

appellants and although a crime had been reported to him, he had no reason to link appellants to the crime from either the description he then had or the questions he asked, since he received completely satisfactory answers both as to their identification and as to where they were coming from, particularly since they were headed toward the scene of the crime rather than away from it. In Mitchell, the officer merely asked defendant to accompany him to a call box, stated that he was not under arrest, did not "pat down" the defendant, and used no physical restraint. In the present case the uniformed officer "invited" appellants into his scout car and took them to the scene. Appellants fail to understand how this could possibly be anything other than an "apprehension or detention of the person of another in order that he may be forthcoming to answer for an alleged or supposed crime" (5 Am. Jur. 2nd, Arrest sec. 3), or that the person of each appellant was restrained and his right of locomotion was restricted, (Price v. United States, D.C. Mun. App. 119 A2d 718) (1956), or that they were taken into custody and restrained of their full liberty (Long v. Ansell, 63 App. D.C. 68, 69 F2d 386 1934); (United States v. Scott, supra), or, in other words, that they were under arrest.

(Pages 14-15, 20, 95-96 of the transcript should be read in connection with the following argument).

II. Whether the trial court committed reversible error by failing to grant appellants' motion to suppress evidence of their identification by the complainant.

Appellants contend that because they were under arrest at the time they were first placed in the patrol car of officer Thomas and because such arrest was illegal, there being no probable cause for it, as conceded by the trial court, certain identification testimony was inadmissable as evidence and upon motion of the defendants in the trial court (Tr. 5 et seq.) should have been suppressed.

The relevant evidence is as follows: After being placed in the scout car of officer Thomas, appellants were driven to the scene of the crime where Mr. Tate, the complainant, was standing with others. Complainant walked over to the police car and officer Thomas testified that he asked him "...Can you recognize any of these men here? And he said Yes, they are the so and so that robbed me." (Tr. 14). "He said that these were the men. He didn't identify any particular one, he said all three." (Tr. 15). No other persons were brought to the scene to be identified (Tr. 20). At the trial complainant Tate testified as follows:

"Q. All right.

And would you describe where was it that you were at the time they brought these people back?

A. I was still standing in the street talking to the officer in the 1700 block of New Hampshire Avenue.

Q. All right.

And where were the people when they brought them back?

A. They were sitting in a station wagon or car, I guess.

Q. And did anyone ask if you could identify any of those persons who were in the car?

A. Yes, sir.

Q. All right.

And did you identify any of those persons?

A. I identified two.

Q. All right.

Do you see the two gentlemen in the courtroom today whom you identified in that car?

A. Yes, sir.

Q. All right.

Would you point them out please, again?

A. Right there, and that one there." (Tr. 95-96).

The record discloses that complainant pointed out the appellants, Messrs. Neal and Robinson (Tr. 96).

Officer Davis also testified at the trial that when the appellants were brought to the scene, the complainant identified them while they were in Officer Thomas' car. (Tr. 160). The Government made no attempt at trial to show that the in-court identification of appellants was in any way independent, but on the contrary expressly linked the in-court identification directly to the prior identification at the scene.

The Supreme Court held more than fifty years ago in Weeks v. United States, 232 U.S. 383 (1914) that evidence seized during an unlawful search could not constitute proof against the victim of the search. Since that time the courts have consistantly broadened the protection under the Fourth Amendment in this area of the law based upon sound considerations of policy and reason. See Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), McGinnis v. United States, 1st Cir. 227 F2d 598 (1955), United States v. Meachum, (D.C. Cir. 197 F. Supp. 803 (1961), Wong Sun v. United States, 371 U.S. 471 (1963), Bynum v. United States, 104 U.S. App. D.C. 368, 262 F2d 465 (1959), Wright v. United States, ____ U.S. App. D.C. ____F2d _____, No. 20, 153 decided 1/31/68.

Leaving aside for the moment the very prejudicial circumstances under which the identification in this case was made and the application of United States v. Wade, 388 U.S.

218 (1967) and Gilbert v. California 388 U.S. 263 (1967) to the present facts, we are still faced with the fact that these appellants were illegally arrested, that their identification by the complainant at the scene was a direct product of such illegal arrest and that the on-scene identification was not only introduced in evidence but was used specifically as the basis for the in-court identification. And the protection of the Fourth Amendment is not so narrow as to distinguish between the more traditional tangible property or confession to be excluded and evidence relating to an identification as here.

> "...The Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects'. Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. McGinnis v. United States, 227 F2d 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."
>
> Wong Sun v. United States, supra, p. 485

Although the Court in making the above statement was concerned with a verbal statement made by a defendant, appellants in this case can find no basis in the cases or in logic for distinguishing between the introduction of verbal statements and the introduction of testimony concerning persons illegally seized, observed and identified. Certainly it is just a

as prejudicial to appellants to admit this evidence as it would be to introduce a package of narcotics or a confession of guilt in other cases. And certainly but for the illegal arrest the government would not have had the evidence to introduce, or to put it more bluntly, by introducing evidence of the on-scene identification, the government was exploiting the primary illegality.

The government's case here was almost entirely circumstantial, and a major part of the prosecution evidence was the identification testimony. The basic policy for excluding the on-scene identification evidence is two-fold. First, it is to protect the basic constitutional rights guaranteed the accused. Second, in protecting these rights under the Fourth, Fifth and Sixth Amendments, the court is assuring that the police specifically and the prosecution in general are denied an incentive to infringe upon these rights by suppressing not only evidence of the specific infringement, which in this case as in most others would be superfluous, but also any and all evidence gained as a proximate result of such infringement, the "fruit of the poisonous tree". As Judge Youngdahl stated in United States v. Meachum, 197 F. Supp. 803 (1961), at p. 805:

> "The import of the Fourth Amendment is that an individual may not be arrested and retained in custody without probable cause (cit. omitted). And where the Fourth Amendment is violated, any evidence procured through such violation is to be suppressed; without this 'deterrent safeguard * * * the Fourth Amendment would [be] reduced to 'a form of words' (cit. omitted)'" (emphasis added).

And Judge McGowan, of this Court, in Adams v. United States, _____U.S. App. D.C. _____, _____F2d ____, No. 20,547 decided June 21, 1968, stated that it is not a particular exclusionary rule which is determinative, but rather "the sweep of the general policy of excluding evidence gathered during a period of detention following upon an unlawful arrest", and he quotes Bynum as follows:

> "In these situations it is deemed a matter of overriding concern that effective sanctions be imposed against illegal arrest and detention and the risks of overreaching inherent in such action. Even though highly probative and seemingly trustworthy evidence is excluded in the process, this loss is thought to be more than counter-balanced by the salutory effect of a forthright and comprehensive rule that illegal detention shall yield the prosecution no evidentiary advantage in building a case against the accused. All of this is bottomed on the Constitution itself. The Fourth Amendment makes protection of the individual against illegal seizure or arrest a constitutional imperative."
> Bynum v. United States, supra, at p. 467

Certainly some vague distinction can be made between the various types of evidence to be excluded. A package of narcotics is different from a statement or confession. But distinctions of this sort blur the basic question of policy and sometimes strain the bounds of logic. The distinction between admission and exclusion must not be based upon the type of evidence involved, but upon the question: Was there something of evidentiary value obtained by the public authorities as a

proximate result of the illegal arrest? If an article had been taken from the person of one of the defendants on the occasion of his illegal arrest, it would not have been admissable against him although it was relevant and entirely trustworthy as an item of proof. United States v. Di Re, supra. If the police had obtained a statement or admission from a defendant during his illegal detention, again it would have been inadmissable against him. Wong Sun v. United States, supra. It is inconceivable to defendants that the evidence of their identification, gained solely because the police exploited an illegal seizure of their persons by confining and transporting them to the scene of the crime, should not also be excluded.

(Pages 34-44, 66-69, 84-87, 95-98 and 112-116 of the trial transcript should be read in connection with the following argument).

III. The appellants rights under the Sixth Amendment were violated by the government's introduction into evidence the pre-trial identification of appellants.

At the trial, the complainant was called by the Government to testify. Under examination by the U.S. Attorney, this witness was questioned not only as to his identification of the appellants, but also as to the custodial confrontation with appellant shortly after the appellants arrest.

This Court in Wright v. United States, _____ U.S. App. D.C. _____ No. 20, 153 (D.C. Cir. January 31, 1968) noted the application to criminal proceedings in the District of Columbia, the Supreme Court decisions in U.S. v. Wade, 388 US 218,87 S. Ct. 1926 (1967); Gilbert v. California, 388 US 263,87 S. Ct. 1951 (1967), and Stovall v. Denno, 388 US 293, 87 S. Ct. 1967 (1967).

The Wade case requires that the Government establish a clear showing that a witness who has been confronted with a defendant, prior to trial but after arrest, without the presence of counsel, is able to identify the defendant independently of the experience of the improper confrontation. The Government made no such showing or demonstration in appellants' case, even though the testimony clearly established that the appellant was viewed by the complainant under the most suggestive of circumstances, i.e., individually while in the custody of the police and seated in the back of a police cruiser with the one of the officers asking the complainant whether the appellants were among his assailants.

The aforedescribed error, moreover, was compounded, when the prosecution elicited from the complainant this prior confrontation and identification. Under the decision in Gilbert v. California, supra, a conviction

must be reversed if there has been introduced into evidence in any trial involving a custodial confrontation held after June 12, 1967, evidence of the illegal confrontation itself. Such evidence was deliberately and carefully elicited and introduced by the Assistant United States Attorney at the appellants' trial. Thus, rather than making the requisite showing of independent recollection which could have possibly remedied the unconstitutional confrontation, the Government elected to compound the error by introducing evidence of it into appellants' trial, thus rendering the error irremediable, and requiring, under the Gilbert decision, a reversal of the appellants' convictions.

(Pages 112-116, 174-175, 180-181, 192-193, 228-229, and 253 of the trial transcript should be read in connection with the following argument)

IV. Evidence of pre-trial identification should have been suppressed upon the grounds that such identification was made under circumstances so highly suggestive and prejudicial as to deprive appellants of due process of law.

The manneriin which the confrontation was conducted was patently so unnecessarily suggestive and conducive to irreparable mistaken identification that the appellants were

denied due process of law. Stovall v. Denno, supra 302; See also Palmer v. Peyton 359 F2d 199 (CA 4th Cir 1966).

As was stated in Stovall v. Denno, supra at 302:

> "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it---."

In the instant case, the appellants were picked up off a public street by the police and then transported in the back-seat of a police cruiser to the scene of the instant crime, where the complainant was requested to view the appellants and state whether they were his assailants. It is of considerable significance to consider the emotional stability of the complainant, when he was requested to make his identification. The complainant had just shortly before been the victim of a serious assault at the hands of some seven assailants who had accosted him in his vehicle and compelled him to take flight for his safety. The medical evidence clearly manifests the degree of trauma physically inflicted upon him. Additionally the short duration of complainant's confrontation with his attackers makes it questionable as to whether he could properly familiarize himself with their

features. With this background in mind, it would unduly stretch one's credulity to believe that when the complainant was confronted by the appellants, seated in the backseat of a police cruiser, with a police officer asking whether the complainant could identify them as being among his assailants, that he was not decidedly influenced by the circumstances surrounding the confrontation.

As was stated in United States v. Wade, supra, 229:

> "Suggestion can be created intentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."
>
> "Moreover, '(i)t is a matter of common experience that, once a witness has picked out the accused at the line-up he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'"

As in Stovall, supra, where that Court found the vice of suggestion existant where the suspect was presented alone to the witness while handcuffed to police officers, here the appellants were presented to the complainant while seated in the back of a police cruiser with the police making the inquiry as to the identifications. Indeed, under the instant circumstances,

> "(i)t is hard to imagine a situation more clearly conveying the suggestion to the witness that the

presented is believed guilty by the police. See Frankfurter, The Case of Sacco and Vanzetti 31-32." United States v. Wade, supra. 234.

CONCLUSION

WHEREFORE, appellants respectfully request that each of their convictions be reversed and that they be released from custody, or in the alternative that each be granted a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing Brief for Appellants was hand delivered to the Office of the United States Attorney, U. S. Court House, Washington, D. C. 20001 this _____ day of December, 1968.

_____
John F. Wilson, Jr.

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